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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

346 U.S.
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No. [redacted]80

MRS. MARILYN CAGLE, INDIVIDUALLY AND AS GUARDIAN FOR DANNY RAY CAGLE, MINOR, *Petitioner,*

vs.

GEORGE F. McQUEEN AND ART STOUT, INDIVIDUALLY, ETC. D/B/A McQUEEN AND STOUT,

AND

GULF OIL CORPORATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WARREN E. MILLER,
JOHN J. WATTS,
JEROME POPE,
Counsel for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Mrs. Marilyn Cagle, individually and as guardian for Danny Ray Cagle, a minor, prays that a writ of certiorari be issued to review a judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on December 2, 1952 (R. 345).

Opinion Below

The opinion below is reported in 200 F. 2d 186-191 (R. 337-344).

Jurisdiction

The judgment of the Circuit Court of Appeals was entered on December 2, 1952 (R. 345), petition for rehearing was denied January 19, 1953 (R. 353), and this court on April 17, 1953, extended the time for filing this petition for writ of certiorari to and including May 19, 1953.[1] The jurisdiction of this court is invoked under Title 28 U. S. C. 1254.

Question Presented

Where a prospective juror in a United States District Court in Texas, in a suit based upon diversity of citizenship, on his *voir dire* examination denies bias or prejudice and is accepted as a juror on this statement, and it later appears the juror was prejudiced aganst the attorney for the plaintiff, does such prejudice when brought to the attention of the District Court on petition to set aside judgment and for a new trial require the verdict rendered against such attorney's client to be set aside?

Statutes Involved

28 U. S. C. 1861 provides:

> "Any citizen of the United States who has attained the age of 21 years and resides within the judicial district, is competent to serve as a grand or petit juror unless:
>
> • • •
>
> "(4) He is incompetent to serve as a grand or petit juror by the law of the State in which the district court is held."

[1] 28 U. S. C. 2101(c) authorizes this action.

Article 2134 Subsection (4) of the Revised Civil Statutes of Texas, 1925, provides that a person shall be disqualified to serve as a juror who has a bias or prejudice in favor of or against either of the parties.

Sec. 15, Article I, of the Texas Constitution, provides that the right of trial by jury shall remain inviolate.

Statement

A suit (R. 2-11), based upon diversity of citizenship, was filed in the United States District Court for the Western District of Texas for the wrongful death[2] of Ray E. Cagle by his widow for herself and as guardian of her minor son, based upon gross negligence of his employers. This case was submitted to a jury, which returned a verdict in favor of defendants (R. 278-9).

Petitioner requested a new trial because of the prejudice of a juror, Verner E. Danielson, against petitioner's attorney, John J. Watts. This juror on his *voir dire* answered in the affirmative the question of whether he could be a fair and impartial juror.

The motion for new trial was supported by an affidavit from the juror, Danielson (R. 287). The court below quoted from this affidavit showing that this juror a few days before the trial, had stated in substance

> "to a lawyer friend in connection with the litigation that 'I had heard something about a lawyer who had most of the damage suit cases in that Court, and from what I had heard I had concluded that he was using the Court for a sort of racket which I did not approve of, and that for that reason I probably would not be accepted as a juror in any case that this lawyer was trying;' that at the time he made the statement, he may not have known the lawyer's name to whom he referred but at the time of the

[2] The Wrongful Death Statute of Texas is found in Title 77 of the Revised Civil Statutes of the State of Texas.

making of the affidavit, he knew that it was John Watts; that 'I listened carefully to all of the evidence and to the Court's charge. I sincerely believe that I followed the Court's charge and gave my decision as fairly as if I had never heard anything which prejudiced me against Mr. Watts. I do not believe that anything I had previously heard or any opinions I had about Mr. Watts personally, in any way affected * * * my decision'."

Reasons for Granting Writ

1. The Fifth Circuit Court of Appeals in this case has decided an important question of local law which conflicts with applicable local decisions. The Texas statute here applicable[3] providing that a person shall be disqualified to serve as a juror who is biased or prejudiced against a litigant has been extended to prejudice against the attorney for such litigant by the Supreme Court of Texas in the case of *Rhoades* v. *El Paso and S. W. Ry. Co., et al.*, 248 S. W. 1064.

2. The decision of the Court below presents a question of importance which should be determined by this Court. If jurors are permitted to proceed with the hearing in a case in which they are prejudiced, as here, after they have been accepted as a result of stating they are not prejudiced and are thereby permitted to serve, the fundamental principles of our system of jurisprudence guaranteeing trial by a fair and impartial jury, a bulwark of our system of jurisprudence, will be circumvented.

3. The public interest will be promoted by settlement of the question here presented by this Court. To permit such a situation as exists here to whittle away the fundamental right of trial by jury is not limited to this particu-

[3] Article 2134(4) of the Revised Civil Statutes of Texas, 1925, quoted under "Statutes Involved", *supra*.

lar case, but the principle established by the Court below when applied as a precedent to future litigation originating in Texas in which this situation arises will cause a far-reaching detrimental effect upon our judicial system.

WHEREFORE, petitioner prays that a writ of certiorari issue under the seal of this Honorable Court directed to the United States Circuit Court of Appeals for the Fifth Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings had in the case numbered and entitled in its docket as 13,955, *Mrs. Marilyn Cagle, Individually and as Guardian for Danny Ray Cagle, a minor son, Appellants,* vs. *Gulf Oil Corporation, et al., Appellees,* to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the order herein of the said United States Circuit Court of Appeals for the Fifth Circuit be reversed by this court, and for such other, further, or different relief as to this court may seem proper.

WARREN E. MILLER,
JOHN J. WATTS,
JEROME POPE,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 811

MRS. MARILYN CAGLE, INDIVIDUALLY AND AS GUARDIAN FOR DANNY RAY CAGLE, MINOR, *Petitioner,*

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Opinion of the Court Below

The opinion of the Court below is reported in 200 F. 2d 186-191.

Jurisdiction

Reference is made to jurisdictional statement in the petition.

Statement of the Case

Reference is made to the "Statement" in petition.

Specification of Errors to be Urged

The court erred:

1. In holding that the affidavit of the juror Verner E. Danielson does not show that he was not competent to serve as a juror;

2. In holding that such affidavit does not disclose anything improper on his part in determining the fact issues which were submitted for jury determination;

3. In overruling petitioner's motion to set aside judgment and for a new trial.

Summary of Argument

Where a juror denies the existence of bias or prejudice in favor of or against either party to a suit, and is thereafter accepted as a juror on the basis of such statement, the complaint by the party against whom such bias or prejudice exists is a proper ground for setting aside the verdict.

Argument

From the affidavit of the juror Verner E. Danielson (R. 287-8) it appears that this juror a few days before the trial told a lawyer that he "had heard something" about a lawyer who had most of the damage suit cases in the court stating

> "and from what I had heard I had concluded that he was using the court for a sort of racket which I did not approve of and for that reason I probably would not be accepted as a juror in any case which this lawyer was trying. I do not now recall that I knew this lawyer's name at that time, to whom I referred; but I now know that it was John Watts."

This statement on the part of the juror showed that he had a prejudice against damage suits and had formed the

opinion that the attorney for petitioner was in a sort of "racket" of which he did not approve. By using the term "racket", he clearly inferred that petitioner's attorney was engaged in obtaining money fraudulently. Racketeers are generally referred to as those who engage in dishonest practices for profit. This juror obviously knew that if he admitted this prejudice he would not be accepted as a juror, as established by his own affidavit. This clearly shows a strong prejudice against petitioner's attorney, Watts. No matter what he said after returning a verdict, his remarks would not excuse his wanton misconduct in not divulging his prejudice when questioned on his *voir dire.*

His statement cannot be accepted as conclusive evidence of impartiality, as the test of bias sufficient to exclude a juror for cause is not what the particular juror himself believes. Long ago Chief Justice Marshall ruled that a person

> "may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice; because in general persons in a similar situation would feel prejudice." 1 Burr's Trial, 414, 415, 25 Fed. Cas. 14696 at p. 50.

This court, while recognizing that persons of the "highest honor and greatest self-sacrifice" would not be influenced by fear of financial losses, has said that

> "every procedure which would offer a possible temptation to the average man as a judge * * * not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law." *Tumey* v. *Ohio*, 273 U. S. 510, 532, 71 L. Ed. 749, 758, 47 S. Ct. 437, 50 A. L. R. 1243.

The Texas cases on this matter are controlling because it is provided by 28 U. S. C. A. 1861, Sub-division 4, that:

"No one is competent to serve as a grand or petit juror unless he is competent so to serve by the law of the State in which the District Court is held."

Article 2134(4) of the Revised Civil Statutes of Texas, 1925, provides that a person who has a bias or prejudice in favor of or against either party to a suit shall be disqualified from serving as a juror. The opinion of the Commission of Appeals adopted by the Supreme Court of Texas in *Rhoades v. El Paso and S. W. Ry. Co., et al.*, 248 S. W. 1064, should be the only case that this Court needs to consider to grant this Writ and to reverse this cause. We quote from the *Rhoades* case as follows:

"Among the reasons which disqualify a juror in a particular case under the provisions of article 5117 is the fact that such juror has a bias or prejudice in favor of or against either of the parties to the suit. In such cases it is not necessary that the disqualifying bias or prejudice shall relate solely to the party personally, but it may also relate to such party's case as presented for trial before the jury. *Couts* v. *Neer*, 70 Tex. 468, 473, 9 S. W. 40.

"If a juror, when tested on his *voir dire* concerning his qualifications to sit on the jury in a particular case, denies the existence of any bias or prejudice in his mind in favor of or against either party to the suit, and is accepted as a juror on such statement, according to the great weight of authority, when such bias or prejudice does exist, the party against whom the same exists can complain of the same as a ground for setting aside the verdict. He is not required to show that such bias or prejudice caused or contributed to cause the return of an unjust verdict in his case. It is sufficient that he, without his fault, has been deprived of the constitutional and statutory guaranty of a trial of his case before a fair and impartial jury. It is immaterial in such cases whether a regular statement of

facts is found in the record or not. *Henrie* v. *State*, 41 Tex. 573, 579, 580; *Couts* v. *Neer, supra; Makey* v. *Dryden*, — Tex. Civ. App. — , 128 S. W. 633, 635, 636 (writ refused); *Kansas City L. Ins. Co.* v. *Elmore*, — Tex. Civ. App. — , 226 S. W. 709, 714, 715; *Gulf, C. & S. F. R. Co.* v. *Dickens*, 54 Tex. Civ. App. 637, 118 S. W. 612, 614, 615; *Texas & P. R. Co.* v. *Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410; *Hanks* v. *State*, 21 Tex. 526; *Long* v. *State*, 32 Tex. Crim. Rep. 140, 22 S. W. 409; *Hughes* v. *State*, — Tex. Crim. Rep. — , 60 S. W. 562, 563, 566; *Heasley* v. *Nichols*, 38 Wash. 485, 80 Pac. 769; *Gibney* v. *St. Louis Transit Co.*, 204 Mo. 704, 103 S. W. 43; *West Chicago Street R. Co.* v. *Huhnke*, 82 Ill. App. 404; *French* v. *Smith*, 4 Vt. 363, 24 Am. Dec. 616, 619; *Birmingham R. Light & P. Co.* v. *Drennen*, 175 Ala. 338, 57 So. 876, Ann. Cas. 1914C, 1037."

In *Smith* v. *Allbright*, 279 S. W. 852, the Court of Civil Appeals of Texas at page 856, citing the above case, stated:

> "The authorities in this state are universal in holding that, where a juror in a particular case denies the existence of any bias in his mind in favor of or against either party to the suit, and is accepted as a juror on such statement, the party against whom such bias or prejudice exists can complain of the same as a ground for setting aside the verdict."

It appears quite clear that if a juror is disqualified because of prejudice against an attorney who handles a case upon a contingent fee basis, certainly one who thinks that an attorney is making a "racket" out of damage suits would be disqualified as in the case at bar.

It has been held that one who is prejudiced against negligence actions is not a competent juror in such an action. In *Quill* v. *Southern P. Co.* (Cal.), 140 Cal. 263, 73 Pac.

991, an action for wrongful death, it was held to be error to deny challenges for cause to jurors who felt a prejudice against suits to recover damages for personal injuries, believing that many such were brought without merit, and that the number was constantly increasing. In *Fitts* v. *Southern P. Co.* (1906), 149 Cal. 310, 118 Am. St. Rep. 130, 86 Pac. 710, it was held to be error to disallow a challenge to a juror in a negligence case, where the juror held a fixed and abiding prejudice against negligence actions.

The law in Texas and throughout America on failure of a juror to disclose prejudice upon *voir dire* examination is so well stated in *Texas Employers' Insurance Association* v. *Wade*, 197 S. W. 2d 203, we quote from that decision at length, as follows:

> "In 39 American Jurisprudence, page 65, Sec. 45, it is stated:
>
> "It seems generally agreed that when matters which might establish prejudice or work a disqualification of a juror are actually gone into upon the *voir dire* examination and false answers are given or deception is otherwise practiced, as a result of which a juror, although disqualified in fact, is accepted, the party misled or deceived thereby, upon discovering the fact of the juror's incompetency or disqualification after trial, may assert that fact as ground for and obtain a new trial, upon a proper showing of such facts, even though, it has been held, the bias or prejudice is not shown to have caused an unjust verdict; it is sufficient that a party, through no fault of his own, has been deprived of his constitutional statutory guaranty of a trial of his case before a fair and impartial jury. The fact that objection was not made to the juror or an exception saved is not controlling. Apparently no distinction is to be made between merely statutory disqualifications and those which affect the impartiality of the juror. Some courts indeed have

declared that the constitutional rights to an impartial jury would be infringed if a new trial were not granted where a juror testified falsely as to his impartiality, and the trial court may, on its own motion, during the trial term, grant a new trial upon this ground."

"The failure of a juror in a damage suit when interrogated on this point on *voir dire,* to disclose the fact that he or some member of his family was, or has been involved in another action for damages, or that a judgment for damages had been rendered against him or some member of his family in another action, will furnish grounds for setting aside the verdict and granting a new trial, when the falsity of his answers are discovered after trial.

"In 31 American Jurisprudence, page 638 Section 108, it is stated: 'Duty and Conduct of Juror,—Full knowledge of all material and relevant matters is essential to a fair and just exercise of the right to challenge either for cause or peremptorily, and it is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact nor concealing any material matter. If he falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, he is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. Such concealment or misstatement is punishable as contempt if its tendency and design are to obstruct the processes of justice, and the privilege from disclosure of the deliberations of a jury does not apply in the case of a juror who has procured his acceptance or retention as such by misrepresentation, even though it may also constitute the crime of perjury.'

"In the case of *Gossett* v. *Jones,* Tex. Civ. App. 123, S. W. 2d, 724, 726, this court had under con-

sideration a case in which a jury, when questioned on *voir dire* examination, failed to disclose the fact that he was related to the appellee within a prohibited degree under Article 2134 of the Revised Civil Statutes of Texas. These facts were set up fully in an affidavit attached to appellant's motion for a new trial. This court, in reversing and remanding the cause for a new trial, held: 'The record fails to disclose that appellants' counsel were negligent in failing to discover these facts, or that they failed to disclose them to the court immediately on making the discovery. Under the above facts, appellants' motion presented good grounds for a new trial. 26 Texas Jurisprudence, page 740, Sec. 173; *Stringfellow* v. *State*, 42 Tex. Cr. R. 588, 61 S. W. 719; *Texas Pacific Railway Co.* v. *Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410.'

"In the early case of *Texas & Pacific Railway Co.* v. *Elliott*, 22 Tex. Civ. App. 31, 54 S. W. 410, 411, one of the jurors failed to reveal that he was related within the third degree to appellant's wife, who was not a party to the suit but who would have benefited by a recovery by the plaintiff. In holding that the proposition presented reversible error, the court said: 'The attorney for defendant believed that by remaining silent the juror intended to answer that he was not related to either party. The fact of relationship between the juror and plaintiff's wife is made to appear by affidavit attached to the motion for a new trial, and, further, that these facts first came to the knowledge of the defendant's attorney after the trial. It clearly appears that defendant's attorney was not guilty of any negligence in failing to discover these facts. The motion presented good grounds for a new trial, and the court erred in refusing to grant the same. *McGegee* v. *Shafer*, 9 Tex. 20. 24; *Hanks* v. *State*, 21 Tex. 526.'

"In the case of *Gulf, C. & S. F. Ry. Co.* v. *Dickens,* 54 Tex. Civ. App. 637, 118 S. W. 612, 615 (no writ applied for), error was assigned based upon the fact that one of the jurors who tried the case had a preconceived idea as to the rights of the party and was thus biased, and that on *voir dire* examination he had testified that he was not biased or prejudiced and had no opinion as to the merits of the case. The court, in holding that the trial court was in error, in its opinion said: '* * * A fair and impartial trial by a fair and impartial jury is what the law exacts, and this requirement becomes a declusion if men with bias or prejudice or preconceived ideas of the rights of one are allowed to set in judgment on his case. *Hughes* v. *State,* Tex. Cr. App. 60 S. W. 562, 565. The facts show that counsel for the appellants were misled into the belief that the juror was fair and impartial, and they did all that could be done to obtain from him the facts, and only learned the truth after the trial. We feel sure that the learned trial judge would have allowed the challenge to the juror if he had told upon his examination the facts that were developed on the motion for new trial. Consequently we are of opinion that these assignments present reversible error, for which the judgment must be reversed.'

"While the Texas courts have not spoken precisely upon the facts here involved, except by way of analogy, insofar as we have been able to ascertain, there are cases from other jurisdictions which are in point upon the factual situation here existing, which we think set forth the only proper and safe rule that can be followed.

"In the case of *Pearcy* v. *Michigan, Mutual Life Ins. Co.,* 111 Ind. 59, 12 N. E. 98, 99, 60, Am. Rep. 673, the court in its opinion announced the rule that:

'That examination of a juror on his *voir dire* has a two-fold purpose, namely, to ascertain whether a cause for challenge exists, and to ascertain whether it is wise and expedient to exercise the right of peremptory challenge given to parties by the law. It is often important that a party should know the relation of a person called as a juror to his adversary, in order that he may interpose a challenge for cause, or exercise his peremptory right to challenge. It is the duty of a juror to make full and truthful answers to such questions as are asked him, neither falsely stating any fact, nor concealing any material matter, since full knowledge of all material and relevant matters is essential to the fair and just exercise of the right to challenge either peremptorily or for cause. A juror who falsely misrepresents his interest or situation, or conceals a material fact relevant to the controversy, is guilty of misconduct, and such misconduct is prejudicial to the party, for it impairs his right to challenge. In this instance, the appellant had a right to a full and truthful answer from Bowman, and it was his duty to make that answer without evasion, equivocation, or concealment.'

"Another leading case bearing upon this subject is the case of *Shulinsky* v. *Boston & M. R. R.*, 83 N. H. 86, 139 A. 189, 191. One of the jurors in that case had had some dealings with the plaintiff, but on *voir dire* examination, though asked, he remained silent and concealed his business relations with the plaintiff. The trial court refused to grant a new trial and the Supreme Court, in holding that a new trial should have been granted, said:

'* * * if by reason of false information furnished under the court's authority and in organizing the jury, a peremptory challenge as to a prospective juror is not exercised, the party having the right of

challenge is as effectively deprived of his right as though the rights were denied—False information thus obtained and relied on is as destructive of a fairly constituted jury in its application to a peremptory challenge as to a challenge for cause. * * *

'Argument that a finding that the trial was fair is not pertinent. The question is whether a proper tribunal was established, and not whether an improperly established tribunal acted fairly. * * *

'If due diligence has been used and there is no waiver of rights, the fact that a juror disqualified either on principal cause or to the favor has served on a panel is sufficient ground for setting aside the verdict, without affirmatively showing that the fact accounts for the verdict. The trial is unfair because the jury is improperly constituted. * * * Nor is there any force in argument that the information although false was unintentionally so, and that there was therefore no bad faith. The harm lies in the falsity of the information, regardless of the knowledge of its falsity on the part of the informant. * * *

'* * * The facts here appearing that false information was given as an incident relating to the trial and that it was relied upon without lack of due diligence, the right to a new trial follows as a matter of law.'

'Under our jury system the parties to a suit may exercise their peremptory challenge in selecting a jury with adequate information concerning the prejudices, bias, point of view, and qualifications of the respective jurors on the panel. To permit a juror to conceal information that would affect the right of the attorneys trying the case in exercising their peremptory challenge would destroy the right to trial by a statutory jury.' "

In a controversy over an estate, in the case of *Kennard* v. *Kennard,* 26 S. W. (2d) 336 in the Texas Civil Court of Appeals, the losing parties appealed on the sole question of misconduct of the jury, contending one of the jurors was prejudiced against them and by reason thereof volunteered statements and information in the jury room which required the case to be reversed. The Court did reverse, stating:

> "It is not required of the complainant to show that probable injury has occurred. The right to a trial by jury has always been held sacred. Litigants are entitled to a jury trial by men who are unbiased or unprejudiced * * *." *Kennard* v. *Kennard,* (Texas Civil Appeals) 26 S. W. 2d 336 (1930), at page 337.

In a suit on an insurance policy the insurer appealed on the ground that one of the jurors was prejudiced against the company's president, the Texas Court of Civil Appeals in *Texas Mutual Life Ins. Association* v. *Morris,* 55 S. W. (2d) 146, said:

> "As has been often said, the right of parties litigant to a fair and impartial trial before an unbiased and unprejudiced jury should and must be, in so far as possible, maintained inviolate by our courts. Our statutes provide that a person who entertains bias or prejudice against or toward one of the parties litigant is not a qualified juror. Our courts uniformly hold that, if one juror is disqualified, the parties have been deprived of their constitutional or statutory right to a fair and impartial trial. We think the trial court erred in refusing to grant applicant a new trial because of the disqualifications of the juror Logan."

The following remarks of the Court of Civil Appeals of Texas in *El Paso Electric Co.* v. *Gambrell,* 292 S. W. 577, at page 580, are believed pertinent:

"It is said in *G. C. & S. F. Ry. Co.* v. *Dickens,* 54 Tex. Civ. App. 637, 118 S. W. 613, that a fair and impartial jury is what the law exacts, and this requirement becomes a delusion if men with bias or prejudice or preconceived ideas of the rights of one are allowed to sit in judgment on his case. It is not necessary that the disqualifying bias or such preconceived ideas shall relate solely to the very party personally, but it may relate to such party's case as presented for trial before the jury. *Rhoades,* v. *El Paso & S. W. Ry. Co.* (Tex. Com. App.), 248 S. W. 1064, 27 A. L. R. 1040; *Smith* v. *Allbright* (Tex. Civ. App.) 279 S. W. 852; *Kansas City L. Ins. Co.* v. *Elmore* (Tex Civ. App.), 226 S. W. 715; *Couts* v. *Neer,* 70 Tex. 468, 9 S. W. 40."

Conclusion

It is respectfully submitted that for the reasons stated this petition for writ of certiorari should be granted, and that upon a review of this case the decision of the Court below be reversed.

Respectfully submitted,

WARREN E. MILLER,
JOHN J. WATTS,
JEROME POPE,
Counsel for Petitioner.

JUN 13 1953
HAROLD B. WILLEY,

No. [redacted]80

In the

Supreme Court of the United States

OCTOBER TERM, 1953

MRS. MARILYN CAGLE, Individually, and as Guardian for DANNY RAY CAGLE, a Minor,

Petitioner,

v.

GEORGE F. MCQUEEN and ART STOUT, Individually, and as MCQUEEN & STOUT, and GULF OIL CORPORATION,

Respondents.

RESPONDENTS' REPLY TO PETITION FOR WRIT OF CERTIORARI

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No. 811

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May It Please the Court:

Petitioner, in the trial court, affixed to her Amended Motion for New Trial the affidavit of the juror, Danielson, which stated that: (1) in the hope that he might be excused from jury duty, for business reasons, he had inquired of a lawyer friend in his home town as to the probabilities of obtaining an excuse from the jury service because of his plans to shear his sheep; (2) in the course of his conversation with his lawyer friend, who was in no way connected with the suit, he had stated a belief that he would not be

accepted as a juror in any case because he had heard that the Trial Court was being used for a "sort of racket which he did not approve of"; his exact statement, as reflected in the record was as follows:

> "I then stated to him, in substance, that I had heard something about a lawyer who had most of the damage suit cases in that court, and from what I had heard I had concluded that he was using the court for a sort of racket and that for that reason I probably would not be accepted as a juror in any case that this lawyer was trying. I do not now recall that I knew this lawyer's name, at that time, to whom I referred; but I now know that it was John Watts." (R., p. 288.)

The juror's affidavit concluded with the statement that after being selected as a juror he listened carefully to the evidence and the court's charge, and rendered what he considered to be a fair verdict and what he had heard about appellant's counsel did not effect his decision.

The United States Circuit Court of Appeals, in passing upon the point now presented to this court, in foot note 4 of the opinion, cited cases which indicated that the court doubted the affidavit of the juror was to be considered for any purpose and then passed upon the point now being presented as follows:

> "Assuming the admissibility of the affidavit, it does not show that Mr. Danielson was incompetent to serve as a juror nor does it disclose anything improper on his part in determining the fact issues which were submitted for jury determination." (200 Fed. 2d 186, ex., p. 189.)

POINT ONE

The Circuit Court of Appeals and the Trial Court properly determined that the affidavit of the juror, Danielson, did not reflect bias or prejudice against petitioner's suit and that the jury verdict and judgment based thereon was not to be properly attacked.

ARGUMENT IN SUPPORT OF POINT ONE

Petitioner seeks to impeach the jury's verdict by use of an affidavit of a juror who served in the case. There is nothing in the affidavit of Mr. Danielson to indicate any improper method on his part of determining the fact issues which were submitted for jury determination in this case. True, before coming to court, the juror had expressed disapproval for the use of a United States District Court "for a sort of racket" and for that reason, anticipated he would not be selected as a trial juror but this statement was made days before court convened.

A losing party cannot use the testimony of a juror to impeach a verdict. *McDonald v. Pless, 238 U. S. 264, 35 S. W. 783, 59 L. Ed. 1300.*

> "*A losing party may not*, in any type of case, *explore a juror's mind for the purpose of demonstrating that his vote resulted from* a misconception of the evidence or a misunderstanding of the charge or from *prejudice.* If the juror reached a conclusion on evidence presented for his consideration, his conclusion cannot be dissected. For such a purpose, no evidence is competent, be it that a juror or an outsider to whom the juror disclosed his inmost thoughts. Proof of such a fact is excluded for at least two reasons: first, because there

> would be no end to litigation if verdicts could be set aside because one juror did not correctly understand the law or accurately weigh the evidence; second, the proof of his mental process is locked in the breast of the juror, and is not capable of refutation or corroboration." Southern Pac. Co. v. Klinge, 65 Fed. 2d 85, ex., p. 88. (Emphasis added.)

Assuming the admissibility of the affidavit—it is the contention of the petitioner herein that the affidavit of the juror shows that the juror was biased to such an extent as to disqualify him in accordance with the rule laid down in *Article 2134, Sub-section 4, Revised Civil Statutes of Texas, 1925*, which provides:

> "that any person who has a bias or prejudice in favor of or against either of the *Parties* is disqualified to serve as a juror in the case."

Petitioner cites the case of *Smith v. Allbright, 279 S. W. 852*, opinion by the Court of Civil Appeals of Texas. This case was finally passed upon and decided by the Commission of Appeals on May 9, 1928, and is reported in *5 S. W. 2d 970*. In the opinion by the Commission of Appeals for the Supreme Court of Texas, *5 S. W. 2d 970*, it is set out that one of the parties sought to set aside the verdict of the jury and the judgment of the court because of bias on the part of one of the jurors. While the jury was out, and during its deliberations, one of the jurors stated that he was acquainted with one of the parties, and had known him for some time, and that he knew the man well enough to know that the man was doing what he thought was right when he bought some property, and that he would

not have bought the property if he had not thought the title was clear. He indicated that he was very much in favor of his friend, and he kept up such an appeal, throughout the deliberations of the jury. It was brought out by the court that the juror did not render a verdict in favor of his friend, simply because he knew him and he was a friend. The Commission of Appeals, in passing upon this question, held that the belief of the juror in the respect indicated was only an opinion and in order to be sufficient to disqualify the juror, it would have to be necessary to show that such opinion was calculated to influence the juror in returning a verdict in the case, and if the juror had testified that notwithstanding such an opinion, he could render a fair and impartial verdict, based alone upon the law and the evidence, he would have been legally acceptable as a juror; the mere fact that a juror knows or is a neighbor to or an intimate acquaintance of, or on friendly relations with the parties to a suit is not sufficient basis for disqualification, or ordinarily even grounds for a challenge for cause. Bias sufficient to disqualify a juror requires that the opinion influence the juror in returning a verdict in the case.

Allmon v. Texas Electric Service Co., 242 S. W. 2d 806, Texas Court of Civil Appeals. A juror made the following statement:

> "I would like to see the man get something, as he is disabled for life, and personally, I would like to see him get something; but if we would award him anything the damn lawyers would get it all, anyway."

This statement was made by the juror outside of the jury room, after the case had been submitted to the jury. Appellant contended the statement showed prejudice against his lawyers. On the Motion for New Trial, the juror denied that such statement truly reflected his feelings or sentiments. Before he was taken on the jury he had stated under oath that he was free from bias and prejudice. The court in passing on this stated:

> "There must be, we think, a finding attributable to the trial judge in overruling the Motion for a New Trial that the juror was fair and impartial."

The court went on further to say that in its opinion that the finding of the Trial Court that disqualifying bias or prejudice did not exist is binding upon the Appellate Court.

The case of *Morrow v. Flores, 225 S. W. 2d 621, Court of Civil Appeals (Writ of Error refused, no reversible error)*, was a case where a man on the jury panel lived in the neighborhood where many of the witnesses in the case lived; the man was acquainted with the plaintiff and a number of the witnesses. He had heard something of a shooting which was the subject-matter of the case. The Court held that the objection to this juror was properly overruled when the juror stated that his acquaintance with the parties and his general knowledge of the shooting would not influence his verdict.

In the case of *Murphy v. State, 141 S. W. 2d 634*, by the Texas Court of Criminal Appeals, a negro was being tried for rape. A juror admitted that he had read the head-

lines of the newspaper relative to the rape of the prosecuting witness, he had probably formed an opinion that the crime of rape had been committed, he had heard the case discussed and that after the defendant had been apprehended he had heard some people say that the officers had gotten the right negro. He stated that he had formed the opinion that the officers in arresting the appellant had gotten the right man, but he also stated that he had formed no opinion that the appellant was guilty, and that he would require the State to prove appellant was guilty, beyond a reasonable doubt, and he would presume appellant was innocent until such proof was made. The court here held that the juror was qualified.

The Federal Courts have followed much the same rule in holding a juror who had formed an opinion but who would disregard it and be governed by the evidence was qualified. *Green v. U S., 19 Fed. 2d 93; Kelly v. Gulf Oil Corporation, 28 F. S. 205, confirmed, 90 L. Ed. 1575.* In this latter case the physician who was defendant's medical witness was also the doctor of a juror sitting on the case. The court held that such juror was not disqualified because of acquaintance or even a professional relationship. See also: *Anderson v. Todd Ship Yard, 63 F. S. 229.*

The most recent case of importance decided by the federal courts, bearing upon this issue, is the case of the *United States v. Dennis, 183 Fed. 2d 201 (Certiorari denied), 342 U. S. 842, 96 L. Ed. 636, 72 S. C. 20.* This is the famous Communist Trial. Prior to his selection a man named Jan-

ney, selected as one of the jurors, had made a speech in which he had said:

> "We are already fighting a war with Communism, and it should be a fight to the death; we are in a war, whether we think we are, or not."

and during the trial of the case Janney made many references to the fact that he was violently and interminably tired of talk and documents about Marxism and Leninism; that he would crown or kick anyone who brought up the subject again. The Court there stated that by no means showed the juror could not throw aside his general predisposition with reference to Communism when he was faced with a specific issue in the case, and that a provisional opinion does not disqualify a juror who believes that he can rid himself of such opinion after he has heard the evidence and under that rule the juror was not disqualified. Even though he violated the directions of the court by talking about his weariness and by expressing hostility for Communism, the Trial Court did not abuse its discretion in refusing to discharge him. The court held that the juror showed he was acutely aware of the difference between Communism to which he was hostile, and the particular charge upon which he was to pass.

It is submitted that the petitioner, Mrs. Cagle, has wholly failed to show any bias or prejudice in favor of Gulf Oil Corporation or McQueen & Stout, or to show any bias or prejudice against her in connection with the juror complained about in this case. *Sub-section 4 of Article 2134, Revised Civil Statutes of Texas, 1925*, sets out that a per-

son is disqualified who has a bias or prejudice in favor of or against either of the *parties*. Petitioner has not shown bias or prejudice. All that she has shown is that one juror had heard something about her attorney and his tactics. He did not approve of them. On voir dire the juror testified that he could be fair and impartial and could and would decide the case on the law and on the evidence presented during the trial. It is submitted that this case was decided on the law and on the evidence.

POINT TWO

The cases cited by petitioner are not in conflict with the Circuit Court of Appeals' opinion here attacked.

Petitioner places much emphasis on the case of *Rhodes v. E. P. & S. W. Ry. Co., 248 S. W. 1064*. On that case there was a juror who expressed himself as being opposed to damage suits on contingent fees and during jury deliberation, he argued that he wanted to stop that sort of business. The case of *Smith v. Allbright*, cited by the petitioner, was overruled and reversed by the Commission of Appeals of the State of Texas in its opinion in *5 S. W. 2d 970*. In the case of *Quill v. Southern Pacific Company, 140 Cal. 263, 73 Pac. 991*, a juror stated that he had a prejudice against suits to recover damages for personal injury, stating that he believed they were being brought without merit and that the number was constantly increasing. Such does not apply in this case, nor does the situation set out in *Fitch v. Southern Pacific Company, 149 Cal. 310, 86 Pac. 710*, cited by petitioner. In the case of *Texas Employers' Insurance*

Association v. Wade, 197 S. W. 2d 203, cited by petitioner, the juror was asked on voir dire whether he or any of his close relatives had ever been a plaintiff in a damage suit or had had a claim for workman's compensation benefits. He was asked if he had been involved in any industrial accident or other accident, had made any claim for workmen's compensation benefits or had been paid any sums of money for workmen's compensation benefits. The juror in that case made no reply to such questions when in truth and in fact he had, prior to the time when the questions were asked, had three workmen's compensation claims. In that case the juror withheld from counsel information the counsel was entitled to have. In that case the counsel was deliberately deceived by the failure of the juror to answer up in reply to the question. The cases cited in the *Wade* case are situations where the juror failed to disclose his relationship to one of the parties, where one of the jurors failed to reveal that he had a preconceived idea as to the rights of the parties, or whether the juror had business relations with one of the parties and remained silent when asked concerning the same, thereby misleading or deceiving one of the counsel. In the case of *Kennard v. Kennard, 26 S. W. 2d 336*, cited by petitioner, one of the jurors volunteered information and statements in the jury room, showing a prejudice against one of the parties. This case was decided under the old rules of the State of Texas which required a reversal for misconduct, *unless no probable* injury was occasioned. The present rules in Texas, as set out by *Texas Rules of Civil Procedure, Rule No. 327*, require a showing of *probable injury done;* therefore, the rule as laid down

in *Kennard v. Kennard* no longer applies in Texas. In the case of *Texas Mutual Life Insurance Association v. Morris, 55 S. W. 2d 146*, cited by the petitioner, we are confronted with the situation where a man on the jury, in the jury room, stated that the President of the corporation party to the lawsuit was a crook. In the case of *El Paso Electric Company v. Gambrell, 292 S. W. 2d 577*, cited by the petitioner, is a case where one of the jurors stated that he had sustained a similar injury and he knew all about the pain and suffering gone through by the plaintiff in the Trial Court. This amounted to giving the jury new evidence, which was not presented in court and which was unsworn testimony.

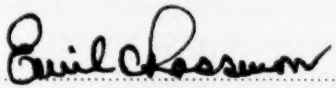
It is submitted that all the cases cited by the petitioner involve situations where there was a hearing on misconduct of the jury or of a juror in the jury-room, or during the course of the trial. It is submitted that the fact situations in the cases cited by petitioner do not apply in the case before this court. In this case we have no showing whatsoever of any bias, and there is no showing of any misconduct of any character during the deliberation of the jury or during the conduct of the trial. It is further submitted that the rule laid down in the case of *McDonald v. Pless, 238 U. S. 264, 35 S. W. 2d 783, 59 L. Ed. 1300*, applies in this case. This is an attempt on the part of the petitioner to impeach the verdict of the jury by use of the affidavit. It is submitted that the affidavit fails to show that Mr. Danielson was not competent to serve as a juror, nor does it disclose anything improper on his part in determining

the fact issues which were submitted for jury determination.

PRAYER

WHEREFORE, respondents McQueen & Stout and Gulf Oil Corporation pray that the Writ of Certiorari sought here will be in all things denied.

Respectfully submitted,



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